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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

ERIC BENEDICT, RICHARD
BOWDERS, and KILRICANOS VIEIRA,
on behalf of themselves and classes of
those similarly situated,

Plaintiffs,

v.
HEWLETT-PACKARD COMPANY,
Defendant.

Case No. C 13-0113 LHK

**PLAINTIFF ERIC BENEDICT'S MOTION
FOR RULE 11 SANCTIONS AGAINST
DEFENDANT HEWLETT-PACKARD
COMPANY AND ITS COUNSEL**

Date: November 21, 2013
Time: 1:30 p.m.
Courtroom: 8, 4th Floor
Judge: The Honorable Lucy H. Koh

HEWLETT-PACKARD COMPANY,

Counterclaimant,

v.

ERIC BENEDICT,

Counterdefendant.

TABLE OF CONTENTS

	<u>Page</u>	
2		
3	NOTICE OF MOTION AND MOTION	1
4	I. INTRODUCTION	2
5	II. FACTUAL BACKGROUND	4
6	A. Mr. Benedict Notified HP Regarding Disputed Material In Order To Discuss Its Orderly Return To HP.....	4
7	B. After Being Alerted To The Existence Of Imaged Material, HP Refused To Meet and Confer About Its Return or To Provide Authority and Evidence To Support Its Assertion That Mr. Benedict Had No Further Property Rights In Non-HP Material.	5
8	C. HP Filed a Premature TRO Motion Unsupported by Evidence of Imminent Harm.	7
9	D. HP Refused to Provide Mr. Benedict with Good Faith Bases for its Proposed Counterclaims.	8
10	E. HP Filed Its Original Counterclaims Without Basis Or Good Faith Investigation.	10
11	F. Without Foundation, HP Has Filed Amended Counterclaims That Fail To Cure The Same Fundamental Flaws In The Original Set.	11
12	III. ARGUMENT	12
13	A. HP's Factual Contentions Lack Evidentiary Support.	12
14	B. HP's Counterclaims Are Not Warranted By Existing Law.	14
15	C. At This Point, HP's Conduct Can Only Be Interpreted as Being Brought for an Improper Purpose, Such As Harassment Of or Retaliation Against Mr. Benedict for Filing a Claim Against HP.	15
16	IV. CONCLUSION	17

1
2 **TABLE OF AUTHORITIES**
3

		<u>Page</u>
1	Cases	
2		
3	<i>Am. Fire Protection Serv. v. Williams,</i> 171 Cal. App. 2d 397 (1959).....	9
4		
5	<i>Bramalea Cal., Inc. v. Reliable Interiors, Inc.,</i> 119 Cal. App. 4th 468 (2004)	14
6		
7	<i>Cal. Packing Corp. v. Stone,</i> 64 Cal. App. 488	14
8		
9	<i>Copple v. Astrella & Rice, P.C.,</i> 442 F. Supp. 2d 829 (N.D. Cal. 2006)	12
10		
11	<i>Davis v. Air Tech. Indus.,</i> 22 Cal. 3d 1 (1978)	8
12		
13	<i>Holgate v. Baldwin,</i> 425 F.3d 671 (9th Cir. 2005).....	11, 13
14		
15	<i>Hudson v. Moore Business Forms,</i> 836 F.2d 1156 (9th Cir. 1987).....	15
16		
17	<i>Huetting & Schromm, Inc. v. Landscape Contractors Council,</i> 790 F.2d 1421 (9th Cir. 1986).....	15
18		
19	<i>John Hancock Mut. Life Ins. Co. v. Sester,</i> 42 Cal. App. 4th 1524 (1996)	9
20		
21	<i>Kendrick v. Zanides,</i> 609 F. Supp. 1162 (N.D. Cal. 1985)	12
22		
23	<i>KinderStart.com, LLC v. Google Inc.,</i> Case No. C 06-2057 JF (RS), 2007 U.S. Dist. LEXIS 22648 (N.D. Cal. Mar. 16, 2007).....	12
24		
25	<i>Marcavage v. City of N.Y.,</i> 689 F.3d 98 (9th Cir. 2012).....	9
26		
27	<i>Scripps Health v. Marin,</i> 72 Cal. App. 4th 324 (1999)	9
28		
29	<i>Shum v. Intel Corp.,</i> 630 F. Supp. 2d 1063 (N.D. Cal. 2009)	14
30		
31	<i>Terran v. Kaplan,</i> 109 F.3d 1428 (9th Cir. 1997).....	12, 13
32		
33	<i>Townsend v. Holman Consulting Grp.,</i> 929 F.2d 1358 (9th Cir. 1990).....	14
34		
35	<i>W. Coast Theater Corp. v. City of Portland,</i> 897 F.2d 1519 (9th Cir. 1990).....	12, 13

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE, on November 21, 2013 at 1:30 p.m., or as soon as practicable
3 thereafter, before the Honorable Lucy H. Koh in Courtroom 8 of the United States District Court
4 for the Northern District of California – San Jose Division, Plaintiff-Counterdefendant Eric
5 Benedict will move the Court to impose sanctions on Defendant-Counterclaimant Hewlett-
6 Packard Company and its counsel for violating Federal Rule of Civil Procedure 11 in connection
7 with HP's filing of its First Amended Counterclaims ("Amended Counterclaims" or "FACC")
8 against him.

9 This motion is based on this Notice of Motion and Motion, the supporting Memorandum
10 of Points and Authorities, the accompanying Declaration of Jahan C. Sagafi, any papers filed in
11 response, the argument of counsel, and all papers and records on file in this matter.

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1 **I. INTRODUCTION**

2 Despite Plaintiff Eric Benedict's consistent efforts to cooperate with Defendant Hewlett-
 3 Packard Company ("HP"), HP insists on suing him to get a remedy it is already receiving through
 4 Mr. Benedict's voluntary cooperation. After filing deficient counterclaims two months ago, HP
 5 has now filed amended counterclaims for breach of contract and replevin, which suffer from the
 6 same serious flaws as the original frivolous pleading. It is becoming clear that HP is not sincerely
 7 interested in an orderly return of material, but instead desires to prolong unnecessary satellite
 8 litigation and harass Mr. Benedict.

9 The backdrop to this story is well documented. Like countless other employers, HP
 10 supplied its employees, including Mr. Benedict, with a laptop on which he was expected to
 11 perform work remotely. As he carried this laptop with him outside of business hours as part of
 12 his normal job responsibilities, Mr. Benedict stored both work documents and personal materials
 13 on it. When he left HP, he wanted to be sure to collect all the personal material he maintained on
 14 his company-issued laptop. Accordingly, he imaged the laptop hard drive to ensure he captured
 15 his personal material. Mr. Benedict has kept those documents to himself and not shared them
 16 with anyone, except his attorneys at Lieff, Cabraser, Heimann & Bernstein ("LCHB Attorneys").
 17 In turn, his LCHB Attorneys provided the documents to two data analysis vendors solely for the
 18 purpose of returning the documents to HP after HP expressed a preference that Mr. Benedict not
 19 segregate and return the documents himself, but use such a vendor.

20 As the Court is aware, when Mr. Benedict's counsel learned about the nature of those
 21 documents, they notified HP to discuss how to handle the documents. HP requested that Mr.
 22 Benedict return everything that had been imaged. Mr. Benedict's counsel noted that some of the
 23 material constituted Mr. Benedict's co-mingled personal property and attempted to agree on a
 24 process by which Mr. Benedict could return any HP documents to HP, while keeping his personal
 25 documents. Since then, the parties have moved forward with the segregation process, stipulating
 26 to a four-page protocol to guide the vendor's return of the parties' respective material.

27 Declaration of Jahan C. Sagafi ("Sagafi Decl.") ¶ 14.

28 Throughout this process, Mr. Benedict has consistently agreed that he will return material

1 in which HP asserts a property interest (“Disputed Material”). As the Court noted at the May 29,
 2 2013 Case Management Conference (“CMC”), Mr. Benedict deposited the imaged HP hard drive
 3 in his possession with a neutral third-party vendor. Sagafi Decl., Ex. J, at 30:3-31:13 (May 29,
 4 2013 CMC Tr.). Since May 21, 2013, Mr. Benedict has relinquished control of any devices in his
 5 possession that he knows to contain Disputed Material, and has confirmed that he has done so in a
 6 sworn written statement confirmed by deposition testimony. Declaration of Eric Benedict
 7 (“Benedict Decl.”) ¶ 4 (Dkt. No. 56); Sagafi Decl., Ex. I at 24:14-19, 25:14-23 (relevant excerpts
 8 of transcript of July 15, 2013 deposition of Eric Benedict).

9 Despite these facts and the sworn testimony Mr. Benedict gave during a special two-hour
 10 deposition -- at which he confirmed he did not disclose any Disputed Material to anyone other
 11 than his LCHB Attorneys -- HP insists on asserting new and amended counterclaims against him
 12 based on unsubstantiated assertions. HP’s current iteration of counterclaims includes the
 13 following frivolous allegations:

- 14 • HP asserts, “Counter-Defendant either held concurrent employment
 15 while employed with HP or left HP for a company that, like HP is
 16 involved in Enterprise Security products, and he performs
 17 substantially similar work for his current employer as he performed
 18 for HP.” HP 1st Am. Counterclaim (“FACC”) ¶ 29 (emphasis
 19 added).¹ This is patently false. As HP’s counsel knows (having
 20 been provided the identity of Mr. Benedict’s employer), Mr.
 21 Benedict’s employer is not “involved in Enterprise Security,” but
 22 rather specializes in webcasting.
- 23 • HP alleges, “Although the Imaged Drive and certain other devices
 24 containing HP property have been provided to a third-party vendor,
 25 Counter-Defendant (including through his counsel) has delayed and
 impaired the timely return of HP’s property and HP’s ability to
 access it property directly.” *Id.* ¶ 34. This is fantasy. Mr. Benedict
 has not “delayed” or “impaired” the return of any Disputed
 Material, a process to which he has consistently agreed. The parties
 are now proceeding with the segregation process, pursuant to the
 Court’s May 10, 2013 Order (Dkt. No. 49), the parties’ May 10,
 2013 Joint Report (Dkt. No. 50), the Court’s May 30, 2013 Order
 (Dkt. No. 60), and the parties’ August 2, 2013 Supplemental
 Stipulation (Dkt. No. 92). To the extent that HP bases its claim of
 delay on the ongoing Court-approved process, such claim is

26 ¹ HP explains that “Enterprise Security” relates to “security management” for various entities
 27 “seeking to safeguard their trade secrets and confidential consumer data for which they may have
 28 stringent legal obligations to protect.” FACC ¶ 9; *see also* Decl. of Lydia Lim in Support of *Ex
 Parte Notice for Appl. for Mots.* (“Lim Decl.”) ¶¶ 2-3 (Dkt. No. 45) (explaining “HP’s Enterprise
 Security products”).

1 patently in bad faith.

2 Further, HP has no evidentiary basis to support its allegation that it has suffered harm and
 3 damages in the forms of “lost profits, unjust enrichment, and/or reasonable royalties.” FACC
 4 ¶ 35; *id.* at 34 (seeking “nominal or compensatory damages, lost profits, restitution, and/or
 5 royalties”). Mr. Benedict confirmed in a May 21, 2013 declaration and at his July 15 deposition
 6 that he has not shared any information with anyone other than his attorneys and has provided such
 7 information to a vendor HP identified, all at Mr. Benedict’s expense. Benedict Decl. ¶ 4; Thus,
 8 HP cannot have suffered harm or damages.

9 HP’s insistence on asserting ill-founded counterclaims against Mr. Benedict, despite
 10 already being given fair warning about the problems associated with filing first and investigating
 11 later, serves only to highlight HP’s ongoing effort to harass a former employee seeking to
 12 vindicate his rights, unnecessarily delay this litigation, and deplete needlessly Mr. Benedict’s and
 13 the Court’s resources. This conduct violates Rule 11 of the Federal Rules of Civil Procedure.
 14 Sanctions against HP and its counsel are warranted.

15 **II. FACTUAL BACKGROUND**

16 Mr. Benedict recounts much of the chronology of the parties’ interactions regarding the
 17 Disputed Material in his Opposition to HP’s *Ex Parte* Motion for a Temporary Restraining Order,
 18 etc. (Dkt. No. 47). Below, Mr. Benedict summarizes and supplements that chronology as
 19 necessary to provide context.

20 **A. Mr. Benedict Notified HP Regarding Disputed Material In Order To Discuss**
 21 **Its Orderly Return To HP.**

22 On Friday, May 3, 2013, Mr. Benedict’s counsel notified HP by letter that Mr. Benedict
 23 had retained an image of the hard drive of his HP-issued laptop. Sagafi Decl. ¶ 5. Mr. Benedict’s
 24 counsel assured HP that Mr. Benedict “has not shared any HP Property with anyone besides
 25 LCHB’s attorneys.” *Id.*, Ex. A at 1. Mr. Benedict’s counsel also promised that Mr. Benedict
 26 would “return to HP all documents, electronic or otherwise, that appear to constitute HP
 27 Property.” *Id.* at 2. Mr. Benedict’s counsel also advised, “We look forward to working with you

28

1 productively to resolve this issue." *Id.* at 3.²

2 **B. After Being Alerted To The Existence Of Imaged Material, HP Refused To**
 3 **Meet and Confer About Its Return or To Provide Authority and Evidence To**
 4 **Support Its Assertion That Mr. Benedict Had No Further Property Rights In**
 5 **Non-HP Material.**

6 After Mr. Benedict's counsel alerted HP's counsel that Mr. Benedict had retained an
 7 image of his HP-issued laptop, HP refused to cooperate in a plan for segregating and returning
 8 Disputed Material to HP. Instead, HP's counsel emailed a few hours later (at 4:02 p.m. on May
 9 3):

10 • "[W]e demand that you return the entire image of Plaintiff's HP
 11 issued laptop hard drive NOW and all copies thereof. You should
 12 retain nothing."
 13 • "The fact that your client intermingled his personal information on
 14 HP's system is not HP's problem. He has waived any right to
 15 privacy with regard to it."

16 Sagafi Decl., Ex. B at 2.

17 When Mr. Benedict's counsel emailed requesting further support for HP's position, and
 18 noting that HP had failed to cite any law or facts to support an argument that (a) Mr. Benedict
 19 waived his constitutional right to privacy in the personal material stored on the laptop, (b) Mr.
 20 Benedict had lost his property interest in his own data, or (c) Mr. Benedict was required to
 21 immediately provide his data to HP in discovery, (at 4:38 p.m.), HP's counsel responded, "Figure
 22 it out." Sagafi Decl., Ex. B at 1.

23 For the next five days, Mr. Benedict's counsel repeatedly reaffirmed Mr. Benedict's and
 24 Mr. Benedict's counsel's commitment to return all Disputed Material, attempted to meet and
 25

26 ² HP conflates the disclosure of the imaged laptop with the unrelated discussion between the
 27 parties regarding five hardcopy documents that Mr. Benedict provided to his counsel to produce
 28 to HP in connection with initial disclosures. FACC ¶ 33. The hardcopy document discussion
 arose because of a courtesy call Mr. Benedict's counsel placed to HP counsel on Wednesday,
 April 17, 2013, to discuss the confidentiality designation of five documents Mr. Benedict
 intended to produce in connection with his Rule 26 disclosures. Sagafi Decl. ¶ 4. Mr. Benedict's
 counsel volunteered to designate the documents "CONFIDENTIAL" if HP so desired, to save HP
 the time of having to re-designate them under the Protective Order should it disagree with the
 designation. *Id.* HP accepted Mr. Benedict's counsel's offer. *Id.* When HP later insisted that
 Mr. Benedict return the originals of the five documents, Mr. Benedict did so notwithstanding that
 he disagreed with HP's position, solely to reduce the disagreements between the parties about a
 satellite issue. *Id.*

1 confer regarding how to accomplish this logically-complicated segregation project, and, to the
 2 extent HP believed that any segregation of the two parties' data was inappropriate, requested legal
 3 authority and facts supporting HP's claims of waiver of Mr. Benedict's privacy and property
 4 interests in his own material:

- 5 • May 7: During the parties' telephone call, Mr. Benedict's counsel
 reaffirmed Mr. Benedict's desire to return all Disputed Material and
 requested legal authority supporting HP's argument that no
 segregation was first required due to waiver of Mr. Benedict's
 privacy and property interests in his own data. Sagafi Decl. ¶¶ 7-8.
- 6 • May 8 at 9:00 a.m.: Mr. Benedict's counsel wrote a letter
 reiterating, "[w]e have consistently agreed with you . . . that
 Plaintiff shall return non-public information that HP asserts is HP
 property ('HP Property'). . . . If you believe that there is an HP
 policy that Mr. Benedict acknowledged that touches on his
 reasonable expectation of privacy, please produce it and explain
 how you believe it affects his privacy rights." Sagafi Decl., Ex. C
 at 1-3.
- 7 • May 8 at 4:44 p.m.: Mr. Benedict's counsel wrote another letter
 reassuring you that "the material on the hard drive has not been
 reviewed, that the hard drive images are secure, and that we are
 attempting to meet and confer with you to reach a mutually
 agreeable solution that satisfies both parties' interests." Mr.
 Benedict's counsel again requested "all versions of any policy
 affecting Plaintiff's reasonable expectation of privacy in effect at
 the time of his employment and Plaintiff's signed acknowledgment
 of any such policy." Mr. Benedict's counsel confirmed that they
 had conveyed the hard drive to a third-party vendor (Teris), in
 response to HP's earlier proposal that they use a third-party vendor
 to segregate the data, and to accommodate HP's expressed desire
 that Mr. Benedict and his counsel not hold any Disputed Material.
 Sagafi Decl., Ex. D at 1-2.
- 8 • May 9, morning: HP wrote Teris, asserting that if it did not return
 the hard drive to HP, HP reserved "its right to seek any and all
 available judicial redress as against Teris and any of its agents in
 concert with it, including but not limited to emergency injunctive
 relief." Sagafi Decl., Ex. E at 2. HP expressly reserved "any claim,
 right, duty, obligation, defense or objection against Teris or its
 agents." *Id.* That afternoon, Teris returned the hard drive to Mr.
 Benedict's counsel. Sagafi Decl. ¶ 10.
- 9 • May 9 at 4:48 p.m.: Having retrieved the hard drive from Teris in
 response to HP's objection to Teris holding the data, Mr. Benedict's
 counsel emailed HP's counsel to confirm that Mr. Benedict's
 counsel had retrieved the data from Teris and stating, "I propose
 that we agree on a meet and confer process to resolve the hard drive
 issue. The factual and legal issues have not been fleshed out."
 Sagafi Decl., Ex. F at 1.

1 • HP refused to respond to Plaintiff's request for a further discussion
 2 on the issue. Sagafi Decl. ¶ 10.

3 **C. HP Filed a Premature TRO Motion Unsupported by Evidence of Imminent**
 4 **Harm.**

5 On May 9, 2013, seventeen minutes after Mr. Benedict's counsel informed HP that it had
 6 retrieved the Disputed Material from third-party vendor Teris (in light of HP's threats of legal
 7 action against Teris), HP escalated the issue by serving Mr. Benedict with a surprise motion for a
 8 temporary restraining order ("TRO Motion") with proposed counterclaims against him. Sagafi
 9 Decl. ¶ 11. HP did this despite Mr. Benedict's repeatedly-stated commitment to return (and
 10 actions in furtherance of returning) any Disputed Material, and his repeated unsuccessful requests
 11 for a meet and confer to understand HP's assertion that he was required to return imaged material
 12 containing his own property without first segregating it. *Id.* HP served the TRO Motion on the
 13 contrived basis that HP was unable to get Mr. Benedict to return the Disputed Material, even
 14 though HP knew that Mr. Benedict had relinquished that material to a third-party for that very
 15 purpose that same day and that the material was only once again in Mr. Benedict's counsel's
 16 possession due to HP's actions forcing the vendor to return it to Mr. Benedict's counsel. *Id.* ¶ 10.

17 Before filing the TRO Motion (and since), HP has never provided Mr. Benedict any
 18 evidence showing that he had waived his reasonable expectation of privacy or lost his property
 19 interests in his own data, or that he was required to immediately turn over devices that contained
 20 his personal material. Sagafi Decl. ¶ 11.

21 The TRO Motion was unsupported by evidence of immediate and irreparable harm.
 22 Instead, HP merely relied on the Declaration of Lydia Lim, a Director of Technical Support who
 23 did not directly supervise Mr. Benedict. In her declaration, Ms. Lim stated no facts to support her
 24 opinions that:

25 • Mr. Benedict "is untrustworthy."
 26 • She had "no confidence that [Mr.] Benedict has or will fully and
 truthfully cooperate with HP's request to return all HP Confidential
 Information."
 27 • Mr. Benedict "has systematically planned to misappropriate
 Confidential Information so that he could use it for his own
 personal benefit and/or make it available to a competitor of HP."

1 Lim Decl. ¶¶ 8-9. Ms. Lim stated that she based her opinion solely on Mr. Benedict's counsel's
 2 May 3 letter. *Id.* ¶ 8. It is hard to understand how Mr. Benedict's counsel's May 3 letter – which
 3 promised **to return** all Disputed Material and confirmed that to Mr. Benedict's knowledge, no
 4 one but he and Mr. Benedict's counsel ever had the data – could provide a basis for Ms. Lim's
 5 opinions, concerns, and speculation. Sagafi Decl., Ex. A (May 3, 2013 letter to HP counsel).
 6 Notably, Mr. Benedict's direct supervisors did not so speculate about or defame his character in
 7 their companion declarations. *See* Decl. of Ravneet Gill in Support of HP's *Ex Parte* Notice of
 8 Application for Motions (Dkt. No. 43); Decl. of Ans Gregory in Support of HP's *Ex Parte* Notice
 9 of Application for Motions (Dkt. No. 44).

10 Mr. Benedict's counsel worked all night around the clock to inform the Court of the
 11 groundless nature of HP's TRO Motion, filing an opposition in the morning on May 10 that also
 12 requested that the Court order HP to meet and confer. (Dkt. No. 47.) Within three hours, the
 13 Court issued an order requiring the parties to meet and confer and noting that it "remains
 14 disappointed by the parties' lack of cooperation and reasonableness in this case." (Dkt. No. 49.)
 15 On May 13, the Court denied as moot the TRO Motion, directed the parties to meet and confer
 16 regarding HP's proposed counterclaims, and "urg[ed] the parties to be more cooperative and
 17 reasonable." (Dkt. No. 51.)

18 **D. HP Refused to Provide Mr. Benedict with Good Faith Bases for its Proposed**
 19 **Counterclaims.**

20 On May 15, the parties met and conferred pursuant to the Court's May 13 Order. At that
 21 time, Mr. Benedict's counsel reiterated their commitment to resolving this matter quickly and
 22 getting all Disputed Material segregated and returned. Sagafi Decl. ¶ 12. Mr. Benedict's counsel
 23 also requested that HP specify its basis to allege injury or damage, which are elements of each of
 24 HP's three original counterclaims (*i.e.*, violation of the California Uniform Trade Secrets Act
 25 ("CUTSA"), breach of contract, and conversion) identified in the TRO Motion. *Id.* Mr.
 26 Benedict's counsel explained that it was difficult to understand how HP could colorably assert
 27 that it suffered any harm. *Id.* During that meet and confer call, HP's counsel refused to provide
 28 any basis for believing that HP had suffered injury, stating that it was not required to do so. *Id.*

1 Mr. Benedict's counsel noted that Rule 11 still applies to assertions of injury as an element of the
 2 alleged claims. *Id.* Given Mr. Benedict's counsel's consistent confirmation that the data had not
 3 been shared, that any hypothetical risk of injury had been addressed by turning over the material
 4 to a third party, and that Mr. Benedict and Mr. Benedict's counsel were committed to
 5 immediately returning the Disputed Material once it has been segregated from Mr. Benedict's,
 6 Mr. Benedict's counsel advised that they could not see a good faith basis for the counterclaims.
 7 *Id.*

8 On May 15 at 6:11 p.m., HP's counsel emailed to address Mr. Benedict's counsel's
 9 concern that HP lacked a good faith basis for alleging injury and damages. Sagafi Decl. ¶ 13.
 10 HP's counsel referred to "substantial fees" HP has incurred "in connection with its efforts to
 11 divest Mr. Benedict and his agents of its property." *Id.*, Ex. G at 2. Respectfully, the ballooning
 12 fees that HP incurred (and has continued to incur) on this project are wholly avoidable, as Mr.
 13 Benedict's counsel has repeatedly assured HP that the Disputed Material would be returned and
 14 HP counsel refused to meet and confer about it. Regardless, fees alone do not constitute damages
 15 sufficient to sustain a claim, absent statutory or contractual authority providing otherwise. *See*
 16 Cal. Civ. Proc. Code § 1021; *Davis v. Air Tech. Indus.*, 22 Cal. 3d 1, 8 (1978) ("It has long been
 17 held under section 1021 that attorney's fees are not an ordinary item of actual damages.") (citing
 18 cases), *superseded by statute as noted in, John Hancock Mut. Life Ins. Co. v. Sester*, 42 Cal. App.
 19 4th 1524, 1532 (1996) (noting that Cal. Civ. Proc. Code section 1021.6 superseded *Davis* in the
 20 context of indemnification); *Am. Fire Protection Serv. v. Williams*, 171 Cal. App. 2d 397, 404
 21 (1959) ("Generally, fees paid to attorneys are not recoverable from the opposing party either as
 22 costs, damages, or otherwise, in the absence of express statutory or contractual authority.").

23 In HP's counsel's May 15 email, and in HP's prayer for relief in its Amended
 24 Counterclaims, HP inappropriately has sought injunctive relief. Sagafi Decl., Ex. G. Any
 25 conceivable injunctive remedy that could be sought has already been accomplished by Mr.
 26 Benedict providing the data to the vendor for segregation and return, with an agreed-upon process
 27 between the parties underway. Courts issue injunctions only if the plaintiff can show that there is
 28 "certainly impending future injury." *Marcavage v. City of N.Y.*, 689 F.3d 98, 103 (9th Cir. 2012);

1 *Scripps Health v. Marin*, 72 Cal. App. 4th 324, 332 (1999) (“purpose of a prohibitory injunction
 2 is to prevent future harm to the applicant by ordering the defendant to refrain from doing a
 3 particular act”). Injunctive relief “lies only to prevent threatened injury and has no application to
 4 wrongs that have been completed.” *Scripps Health*, 72 Cal. App. 4th at 332. No threatened
 5 injury exists as the orderly return of HP’s Disputed Material has begun.

6 **E. HP Filed Its Original Counterclaims Without Basis Or Good Faith**
 7 **Investigation.**

8 HP filed its original countercomplaint on June 14, 2013. Notably, HP rushed to file this
 9 pleading even though, at that point, HP had not even taken the two-hour deposition with Mr.
 10 Benedict that the Court had ordered on May 30 to allow HP to discover exactly what was imaged
 11 on the laptop. May 30 Case Management Order at 2:16-18 (Dkt. No. 60); Sagafi Decl., Ex. H
 12 (June 18, 2013 email between W. Lazerson and J. Sagafi regarding scheduling Mr. Benedict’s
 13 deposition for July 15). Lacking a good faith basis and without even taking advantage of the
 14 specially-ordered deposition to investigate whether it had any basis for its counterclaims, HP’s
 15 original countercomplaint recklessly alleged:

- 16 • “Despite HP’s best efforts to obtain the return of its property,
 Benedict has refused, thus necessitating the present
 Counterclaim[s].” HP Counterclaim ¶ 8 (emphasis added) (Dkt.
 No. 74). As noted above and as the Court knows, Mr. Benedict
 consistently has agreed to return Disputed Material.
- 17 • That HP repeatedly alleged that Mr. Benedict has failed to return its
 property as a basis for its counterclaims, even though the material
 had been deposited with a third-party vendor chosen by HP for the
 sole purpose of segregating and returning each party’s purported
 property, all at Plaintiff’s expense. *Id.* ¶¶ 27, 29, 31.
- 18 • That Mr. Benedict had “current” and “continuing” possession of
 Disputed property, even though HP knew such material was not in
 his possession, manufacturing “imminent harm” that does not exist.
Id. ¶¶ 29-30.
- 19 • That there was a risk of Mr. Benedict’s “actual or imminent
 disclosure of Confidential Information to a competitor” when there
 was no basis for such assertion. *Id.* ¶ 33.

20 After reviewing the countercomplaint, Mr. Benedict’s counsel filed a Rule 12 motion with
 21 the Court (Dkt. No. 88) and continued their informal dialogue with HP regarding their concerns
 22 that HP lacked a good faith basis for the pleading.

1 On July 15, 2013, HP finally completed Mr. Benedict's special two-hour deposition, at
 2 which Mr. Benedict gave the following testimony under oath,

3 MS. LAZERSON: Can you tell me if you disclosed any HP
 4 material, as we've defined it today, since
 leaving HP to anyone?

5 MR. BENEDICT: Yes.

6 MS. LAZERSON: Okay. And to whom have you disclosed it?

7 MR. BENEDICT: My attorneys.

8

9 MS. LAZERSON: Other than your attorneys, was there anybody
 10 else to whom you disclosed it?

11 MR. BENEDICT: No.

12 MS. LAZERSON: Have you used any HP data in connection --
 13 just for reference in doing your own thing,
 whatever you might do?

14 MR. BENEDICT: No.

15

16 MS. LAZERSON: And does your current employer share any of
 17 the same -- is it in the same business of any
 of HP's what you refer to as noncore areas?

18 MR. BENEDICT: They create enterprise software which HP
 19 divisions create enterprise software, but they
 don't, to the best of my knowledge, compete
 with any division of HP in any area that I'm
 aware of.

20 MS. LAZERSON: All right.

21
 22 Sagafi Decl., Ex. I at 42:21-43:1, 43:9-15, 89:7-14 (excerpts from transcript of July 15, 2013
 23 deposition of Eric Benedict).

24 F. **Without Foundation, HP Has Filed Amended Counterclaims That Fail To**
 25 **Cure The Same Fundamental Flaws In The Original Set.**

26 On August 8, 2013, HP filed Amended Counterclaims that do not include its prior claims
 27 under the California Uniform Trade Secrets Act and for conversion, but contain an amended
 breach of contract claim and a new claim for replevin. These changes fail to cure the

1 fundamental defects in the amended pleading and continue to manifest HP's bad faith. In fact,
 2 the Amended Counterclaims ignore Mr. Benedict's sworn deposition testimony and alleges
 3 without basis that Mr. Benedict left HP to work for a company that "is involved in Enterprise
 4 Security products," that HP has suffered "harm and damages," and that HP is entitled to "lost
 5 profits" and "reasonable royalties." FACC ¶¶ 29 and 35. HP and its counsel's lack of
 6 compliance with Rule 11 must not be tolerated.

7 **III. ARGUMENT**

8 Under Rule 11, an attorney presenting a pleading certifies that the document has "factual
 9 contentions [that] have evidentiary support," "claims . . . [that] are warranted by existing law,"
 10 and "is not being presented for any improper purpose." Fed. R. Civ. P. 11(b)(1)-(3). When a
 11 complaint is challenged under Rule 11, "a district court must conduct a two-prong inquiry to
 12 determine (1) whether the complaint is legally or factually baseless from an objective perspective,
 13 and (2) if the attorney has conducted a reasonable and competent inquiry before signing and filing
 14 it." *Holgate v. Baldwin*, 425 F.3d 671, 676 (9th Cir. 2005) (citation and internal quotation marks
 15 omitted).

16 Thus far, HP and its counsel have knowingly filed an unnecessary TRO and two sets of
 17 counterclaims that have no evidentiary basis. HP's and its counsel's conduct have been
 18 egregious. As explained below, HP and its counsel have failed to satisfy Rule 11's pleading
 19 requirements and should be sanctioned.

20 **A. HP's Factual Contentions Lack Evidentiary Support.**

21 HP's counterclaims are based on speculation and false contentions. HP's filing of such
 22 counterclaims justifies Rule 11 sanctions.

23 Claims that are based on "bare accusations unsupported by allegations of fact" support
 24 Rule 11 sanctions. *W. Coast Theater Corp. v. City of Portland*, 897 F.2d 1519, 1528 (9th Cir.
 25 1990). To be grounded in fact, allegations must be supported by credible evidence, not opinions
 26 or conclusions. *Kendrick v. Zanides*, 609 F. Supp. 1162, 1172 (N.D. Cal. 1985) (Schwarzer, J.);
 27 *accord Copple v. Astrella & Rice, P.C.*, 442 F. Supp. 2d 829, 837 (N.D. Cal. 2006) (White, J.).
 28 Allegations based on speculation "are sanctionable under Rule 11 because they are factually

1 baseless” and demonstrate that the plaintiff “failed to perform an adequate investigation before
 2 filing them.” *KinderStart.com, LLC v. Google Inc.*, Case No. C 06-2057 JF (RS), 2007 U.S. Dist.
 3 LEXIS 22648, at *10 (N.D. Cal. Mar. 16, 2007) (Fogel, J.). For example, allegations of damage
 4 that are not based on a reasonable inquiry and that are subsequently proved false will subject a
 5 litigant to Rule 11 sanctions. *See Terran v. Kaplan*, 109 F.3d 1428, 1435 (9th Cir. 1997)
 6 (concluding that Rule 11 sanctions were warranted in part because there was no evidence of the
 7 damage alleged in the complaint).

8 HP makes the following allegations in support of its Amended Counterclaims:

- 9 • “HP has been harmed and damaged by Counter-Defendant’s, [sic]
 10 theft, secret retention, and/or use of HP’s commercially valuable
 11 property, including its valuable Confidential Information and
 12 Proprietary Developments; such harm and damages include but are
 13 not necessarily limited to lost profits, unjust enrichment, and/or
 14 reasonable royalties.” FACC ¶ 35.
- 15 • “[A]s a proximate result of Counter-Defendant’s breach of contract,
 16 HP has suffered harm and damage and is entitled to recover
 17 damages in an amount to be proved at trial, and/or for unjust
 18 enrichment or reasonable royalties based on the value of property
 19 retained and/or used.” *Id.* ¶ 40.

20 HP has no factual basis for these damages allegations. Although HP provides a laundry list of
 21 complaints about Mr. Benedict in support of these damages allegations, none of them identify
 22 facts suggesting it suffered *any* damage. *See id.* ¶¶ 35(a)-(h). In the context of the factual
 23 background here, where HP has received substantial evidence of *no* harm, HP’s attempts to
 24 manufacture harm and damage are more than suspect.

25 HP’s vague responses thus far are similar to those of the sanctioned party in *Terran*.
 26 There, in response to questions about the plaintiff’s actual damages, the sanctioned party
 27 responded that “[i]f, in fact, the doctor says that he couldn’t see any damages arising out of [the
 28 claimed emotional distress], then, of course, we would drop the claim for actual damages and just
 proceed with the statutory damage request.” *Terran*, 109 F.3d at 1435 n.7. The district court
 responded, “Well, I take it from what you are saying, you haven’t done any investigation, at the
 time you filed the lawsuit, about the actual damages. Doesn’t Rule 11 require you to do that?”
Id. As *Terran* shows, alleging damages without investigating whether damages actually exist is

1 sanctionable.

2 Here, HP does not appear to have investigated whether it has suffered any damages. Its
 3 approach has been to shoot first and ask questions later. This failure to investigate in good faith
 4 warrants Rule 11 sanctions.

5 **B. HP's Counterclaims Are Not Warranted By Existing Law.**

6 HP cannot and does not properly allege the elements of any of its two claims – breach of
 7 contract and replevin. As a result, Rule 11 sanctions are warranted.

8 Rule 11 sanctions may be granted if a plaintiff fails to allege the necessary elements of a
 9 claim. *Baldwin*, 425 F.3d at 676 (affirming award of sanctions when plaintiff failed to allege
 10 element); *W. Coast Theater Corp.*, 897 F.2d at 1526-28 (affirming award of sanctions when
 11 plaintiff failed to allege facts in support of necessary element). Although a plaintiff need not
 12 “detail the facts upon which their claims are based, . . . plaintiffs [must] provide a short and plain
 13 statement of the claim to give the defendants fair notice of what the claim is and the grounds upon
 14 which it is based.” *Holgate*, 425 F.3d at 676 (citation and internal quotation marks omitted). The
 15 presence of any frivolous claim in a complaint makes the pleading susceptible to Rule 11
 16 sanctions. *Id.* at 677 (citing *Townsend v. Holman Consulting Grp.*, 929 F.2d 1358, 1364 (9th Cir.
 17 1990)).

18 **1. HP Has No Factual Basis on Which to Allege Damages Based on Mr.**
Benedict's Conduct.

19 It is elementary that a “breach of contract is not actionable without damage.” *Bramalea*
 20 *Cal., Inc. v. Reliable Interiors, Inc.*, 119 Cal. App. 4th 468, 473 (2004) (citation omitted). “The
 21 ‘breaching party is only liable to place the non-breaching party in the same position as if the
 22 specific breach had not occurred.’” *Shum v. Intel Corp.*, 630 F. Supp. 2d 1063, 1077 (N.D. Cal.
 23 2009) (Jensen, J.) (citation omitted). Where there is no evidence “of any . . . detriment,”
 24 judgment as a matter of law will be entered against the plaintiff. *Id.*

25 Mr. Benedict pointed out this rudimentary element of contract law during the extensive
 26 communications with HP about its lack of a good faith basis for its breach of contract claim.
 27 Nevertheless, HP’s amended breach of contract claim continues to be devoid of any allegations
 28

1 regarding how HP was damaged. Such a claim is legally unsustainable.

2 **2. HP Cannot Maintain an Action in Replevin Because the Disputed**
 3 **Material is Not in Mr. Benedict's Possession and Mr. Benedict Has No**
 4 **Power Over it.**

5 “Under California law, an action filed in replevin is an action to recover wrongfully seized
 6 property.” *Xerox Corp. v. A & M Printing*, Case No. CV 12-00043 MMM (Ex), 2013 U.S. Dist.
 7 LEXIS 74179, at *14-15 (C.D. Cal. May 20, 2013). “In an action in replevin . . . , being an action
 8 for the recovery of specific personal property, in order to sustain a judgment for a plaintiff, it
 9 must be shown that possession is in the defendant at the time of the beginning of the action or that
 10 he has the power to make delivery of the personal property for the recovery of which the action is
 11 prosecuted.” *Cal. Packing Corp. v. Stone*, 64 Cal. App. 488, 492 (1923); *accord Xerox Corp.*
 12 2013 U.S. Dist. LEXIS 714179, at *15.

13 HP’s action in replevin has no factual basis, ignores the jointly agreed-upon segregation
 14 process the parties are following, and contradicts the Court’s instructions regarding the return of
 15 Disputed Material. On May 10, 2013, the Court “recommend[ed] that the parties identify a third-
 16 party litigation vendor that will maintain custody of the subject hard drive and all copies of the
 17 hard drive pending resolution of this issue.” (Dkt. No. 49.) Pursuant to that Order and the
 18 parties’ subsequent agreement, Mr. Benedict deposited the Disputed Material with a third-party
 19 vendor. *See* May 10, 2013 Joint Report at 2 (Dkt. No. 50) (explaining segregation process). On
 20 August 2, 2013, the parties agreed to a specific protocol, outlining a segregation process through
 21 which HP will receive its Disputed Material. (Dkt. No. 92.)

22 HP will obtain its Disputed Material through the parties’ agreed-upon segregation process.
 23 Thus, HP’s replevin action has no basis in law and fails any standard of good faith.

24 **C. At This Point, HP’s Conduct Can Only Be Interpreted as Being Brought for**
 25 **an Improper Purpose, Such As Harassment Of or Retaliation Against Mr.**
 26 **Benedict for Filing a Claim Against HP.**

27 Because HP appears to have no credible basis for its claims, and because the Disputed
 28 Material is in the process of being returned, it appears that the real purpose of HP’s latest round of
 counterclaims is tactical. “Attorneys do not serve the interests of their clients, of the profession,
 or of society when they assert claims or defenses grounded on nothing but tactical or strategic

1 expediency.” *Huetting & Schromm, Inc. v. Landscape Contractors Council*, 790 F.2d 1421,
 2 1426-27 (9th Cir. 1986). An attorney’s expertise and experience, taken together with factually or
 3 legally baseless claims, support a “strong inference . . . that [the] bringing of an action . . . was for
 4 an improper purpose.” *Id.* Here, HP’s counsel has substantial experience in litigating
 5 employment claims on behalf of employers. An improper purpose can be found in an employer’s
 6 assertion of retaliatory damage prayers against a former employee. *Hudson v. Moore Business*
 7 *Forms*, 836 F.2d 1156, 1163 (9th Cir. 1987).

8 In *Hudson*, an employee sued her former employer for wrongful discharge and sex
 9 discrimination. 836 F.2d at 1157. In response, the employer filed claims for tortious conduct and
 10 sought \$4 million in punitive damages. *Id.* The Ninth Circuit affirmed the district court’s award
 11 of Rule 11 sanctions based on “the frivolousness and improper purpose underlying the damage
 12 claim.” This case is similar. HP’s insistence on pursuing its counterclaims in the face of solid
 13 evidence that no damage whatsoever has resulted from Mr. Benedict’s conduct, and despite
 14 Mr. Benedict’s consistent willingness to cooperate in an on-going process to which both parties
 15 have agreed, strongly suggests HP’s frivolous claims are motivated by the improper purpose of
 16 punishing Mr. Benedict for suing his former employer. *See id.* at 1163 (approving sanctions
 17 where employer’s counsel could not identify factual basis for \$4 million punitive damages claim
 18 other than that plaintiff had sought the identical amount, and concluding that such an admission
 19 “strongly suggests a retaliatory motive and erases the factual underpinning from [an] essential
 20 element of [employer’s counsel’s] damage claims”) (internal quotation and citation omitted).

21 Further supporting a conclusion that HP has had an improper purpose throughout this
 22 process are HP’s persistent refusal to meet and confer, resistance to providing authority or
 23 evidence supporting its positions, and apparent desire to escalate this matter despite Mr.
 24 Benedict’s attempts to cooperate and expedite solutions.³ HP has defamed Mr. Benedict in the
 25 public record, exposing him to significant negative impacts on his reputation and ability to secure

26 ³ Indeed, further exemplifying HP’s bad faith, HP’s counsel has threatened retaliation against Mr.
 27 Benedict and his counsel for filing this Rule 11 motion. Sagafi Decl., Ex. K (“As we have
 28 discussed with you explicitly on prior occasions, HP believes that any attempt to challenge its
 counterclaim on the basis of Rule 11 will result in significant adverse consequences to you and/or
 Mr. Benedict.”). Litigation by threat defies the principle of good faith.

1 employment in the future.⁴ Furthermore, perhaps by design, HP's hyper-charged pursuit of Mr.
2 Benedict, despite all rational efforts by Mr. Benedict to work through matters cooperatively,
3 sends a powerful message to employees throughout the company that their assertion of claims
4 against HP will not be tolerated. The Federal Rules prohibit such conduct.

5 IV. CONCLUSION

6 For the reasons set forth above, Plaintiffs respectfully request that the Court dismiss HP's
7 First Amended Complaint and Counterclaims and order appropriate sanctions under Rule 11.

8 || Dated: September 9, 2013

Respectfully submitted,

10 By: /s/ Jahan C. Sagafi
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⁴ Conduct of this nature provides a basis for a claim of FLSA retaliation for compensatory and punitive damages under 29 U.S.C. § 215(a)(3). See *Ford v. Alfaro*, 785 F.2d 835, 841 (9th Cir. 1986) (“[The FLSA] protects employees from retaliatory conduct by the employer.”); see also *Contreras v. Corinthian Vigor Ins. Brokerage, Inc.*, 25 F. Supp. 2d 1053, 1056 (N.D. Cal. 1998) (Conti, J.) (holding that FLSA protects former employees from retaliation); *Darveau v. Detecon, Inc.*, 515 F.3d 334, 343 (4th Cir. 2008) (same) (citing Tenth, Sixth, and Fifth Circuit decisions).